North American Pipe Corporation and Unite Here.[1]

Cases 26–CA–21773 and 26–CA–21833

July 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 29, 2005, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief. The Charging Party filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions,[2] and to adopt the recommended Order.

I. INTRODUCTION

In this case, we consider the lawfulness of the Respondent's unilateral grant of a companywide stock award to employees in a bargaining unit represented by the Union. As explained in more detail below, the one-time grant was made to all employees at each of the Respondent's facilities in connection with the initial public stock offering of the Respondent's parent corporation. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by granting the stock to unit employees without first notifying and giving the Union an opportunity to bargain about the matter. The judge found that the grant of stock constituted a gift and, consequently, was not a mandatory subject of bargaining that required notice to or bargaining with the Union. For the reasons stated herein, we agree with the judge's conclusion.[3]

[1] We have amended the caption to reflect the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by (1) maintaining, giving effect to, and enforcing an overly broad no-solicitation rule, (2) selectively and disparately enforcing a facially valid employee rule, and (3) prohibiting employees from distributing union literature to other employees on the Respondent's parking lot. There are also no exceptions to the judge's finding that deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), is not appropriate here.

[3] The judge also found that the Union contractually waived its right to bargain with respect to the stock award. In light of our conclusion that there was no duty to bargain over this grant of stock, we do not reach the waiver issue.

II. FACTUAL BACKGROUND

The Respondent, a subsidiary of Westlake Chemical Corporation (Westlake), operates 13 manufacturing facilities throughout the United States, including a plant in Van Buren, Arkansas, where it manufactures polyvinyl chloride piping products. The Union represents approximately 50 production and maintenance employees at the Van Buren facility.

On August 11, 2004,[4] Westlake made its initial public stock offering (IPO). Although not mentioned by the judge, on or about August 14, Westlake's vice-president of administration, David Hanson, convened a meeting among Westlake's human resources managers, each of whom was responsible for a different Westlake business unit. The assembled group included Keith Johnson, Westlake's human resources manager for the fabricated products group, which includes the Respondent's Van Buren facility. At that meeting, the human resources managers were informed that Westlake would be giving 100 shares of stock to all Westlake and Westlake-related employees, and that Westlake would be sending letters to all employees notifying them about the stock giveaway.

On August 16, the Respondent posted on the bulletin board in its break room an interoffice memorandum it received from Westlake. The memorandum was from Westlake's president and CEO, Albert Chao, and addressed to "[a]ll regular, full-time employees" at each Westlake-related facility. The memorandum announced Westlake's IPO and stated

> In recognition of this important historic company event and the significant contribution made by each of you toward the growth and success of the company, the Board of Directors has authorized an award of *100 shares* of common stock to each full-time, regular employee with at least six months of service as of today. These shares will be awarded to you initially in the form of stock units, and shares will be distributed to you at the conclusion of six months, provided you remained a regular, full-time employee during that period.
>
> Please accept our appreciation for your efforts. We are confident that as we work together we can continue to build a strong and successful Westlake Chemical Corporation for all of our shareholders, including each of you. [emphasis in original]

Identical memoranda were posted at each of the Respondent's facilities.

Because the announcement coincided with Johnson's regular visit to the Van Buren facility, it was decided that

[4] All dates are in 2004.

he would bring the employee-notification letters with him to the plant. When he arrived, Johnson gave the sealed letters to the Respondent's local human resources representative for distribution. Thus, on August 18, the Respondent distributed to eligible employees at its Van Buren facility the two-page letter from Westlake more specifically detailing the terms and conditions to which the stock award was subject. Identical letters were delivered to eligible employees at the Respondent's other facilities. The letter reiterated that the restricted stock units would vest, and thereafter be issued as shares of common stock, six months after the grant date. If any employee's employment terminated other than by reason of death within that 6-month period, then the unvested restricted stock units would be forfeited. Provision was also made for any tax withholding obligations applicable to the award of stock.[5]

The Respondent awarded the stock units to all eligible employees at all of its facilities, including hourly employees, supervisors, and management employees. This was done without notice to or bargaining with the Union that represents the employees at the Van Buren facility. The stock was valued at approximately $1450 per employee at issuance. By the time of the hearing, it had increased in value to approximately $3000.

III. ANALYSIS

The general principles involved here are well established. An employer and the representative of its employees are obligated to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The mandatory duty to bargain is limited to those subjects; as to all other matters, each party is free to bargain or not to bargain. Ibid. Among those other matters not requiring bargaining are gifts given to employees by their employers. See, e.g., *Benchmark Industries*, 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

The inquiry here is whether the Westlake stock award was a gift or whether it was wages or a term and condition of employment. The Board has construed the term "wages" as used in the Act to include "emoluments of value…which may accrue to employees out of their employment relationship." See generally *Inland Steel Co.*, 77 NLRB 1, 4 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949). On the other hand, it is recognized that gifts do not become wages or terms and conditions of employment simply because they are made in the context of an employment relationship. An employer can make such payments as it pleases. *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965), denying enf. in pertinent part to 147 NLRB 179 (1964).

If the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of the remuneration, they are in reality wages and subject to the statute's mandatory duty to bargain. Ibid.[6] A sufficient relationship to remuneration may exist if the payment is tied to various employment-related factors. See *Benchmark Indus.*, 270 NLRB at 22 fn. 5 (explicitly adopting the analysis used by the Eighth Circuit in *NLRB v. Wonder State Mfg.*, supra, and by former Member Kennedy in his dissent in *Nello Pistoresi & Sons*, 203 NLRB 905, 907 (1973)); see also *Freedom WLNE-TV, Inc.*, 278 NLRB 1293, 1297 (1986). These factors include work performance, wages, regularity of the payment, hours worked, seniority, and production.[7]

In *Benchmark Industries*, the Board looked to these factors in finding that the employer did not violate Section 8(a)(5) by unilaterally discontinuing the giving of Christmas hams and dinners. It concluded that these items were "merely gifts" because they "had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors." 270 NLRB at 22. Similarly, in *Stone Container Corp.*, supra, the Board found that the employer did not violate Section 8(a)(5) by unilaterally discontinuing a company picnic, a $20 Christmas gift certificate, and a Thanksgiving dinner. The Board found that these were gifts rather than terms and conditions of employment because they "were not related to any performance or production standards." 313 NLRB at 337.

[5] The letter provided for "withhold[ing] an appropriate number of shares of Common Stock, having a Fair Market Value . . . equal to the amount necessary to satisfy the minimum federal, state and local tax withholding obligation with respect to this Award." In the alternative, the letter provided for "tax withholding to be satisfied by a cash payment to the Company, by withholding an appropriate amount of cash from base pay, or by such other method as the [plan] Administrator determines may be appropriate. . . ."

[6] In *NLRB v. Wonder State Mfg. Co.*, 344 F.2d at 213, the Eighth Circuit stated the rule as follows:

> The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make such payments as he pleases, but if the gifts or bonuses are so tied to the remuneration which employees received from their work that they were in fact a part of it, they are in reality wages and within the statute. This is a question of fact. . . .

[7] See, e.g., *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001); *Stone Container Corp.*, 313 NLRB 336, 337 (1993); *Mr. Potty, Inc.*, 310 NLRB 724, 729–730 (1993); *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994); *Freedom WLNE*-TV, 278 NLRB at 1297; *Benchmark Indus.*, supra.

In cases where the Board has found payments to constitute wages, there have been clear ties to employment-related factors. See *Niles-Bement-Pond Co.*, 97 NLRB 165, 166 (1951), enfd. 199 F.2d 713 (2d Cir. 1952) (Christmas bonus constituted wages where it was calculated either as one week's pay, a percentage of each employee's yearly earnings, or a dollar for each year of continuous service, and was thus "directly related in amount and supplementary to [employee] wages or earnings."); *Freedom WLNE-TV*, supra (Christmas bonus was a term and condition of employment because it was computed using a "perceivably objective formula" based on the employees' weekly base salary and years of service); *Phelps Dodge Mining Co.*, supra ("appreciation payments" in amounts of up to $1000 "constituted significant economic benefits to eligible employees *based on the employment-related factors of wages and hours worked*" where the amount "was a function either of the work [the employees] had recently performed, or of the regular wages they were currently earning") (emphasis added). These factors are not present in this case.

Our finding that the stock award in this case was a gift is consistent with the analysis used in the aforementioned precedent. The award was not tied to employee remuneration. The size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity. In fact, the value of the award, when announced and when vested, was determined solely by market demand for equity shares in Westlake. Further, all eligible employees at each of Westlake's facilities, including the Respondent's Van Buren plant, received the same amount of stock whether they were the highest paid managers or the lowest-paid hourly employees. Finally, the award was related to a one-time event—the parent corporation's IPO—with no promise or prospect of repetition.

We recognize that the Board found that a stock award constituted wages in the context of a refusal-to-bargain analysis in *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951). That case does not support our colleague's position that the stock here constituted wages. First, *United Shoe Machinery* predates by approximately 30 years the Board's adoption in *Benchmark Industries* of the multi-factor gift analysis we apply here, and the earlier case was not thereafter cited for the proposition stated by the dissent. Second, the case is factually distinguishable. By the time the union in *United Shoe Machinery* requested bargaining over "the policy and method of distributing stock bonuses in the form of 10 shares of stock to each employee with 25 years or more of service," the employer had maintained the practice for over 25 years. *United Shoe Machinery*, 96 NLRB at 1321–1322, 1326. Consequently, unlike the present case, *United Shoe Machinery* is comparable to those cases in which the Board has found that an employer cannot unilaterally discontinue a bonus if it is of a fixed nature and has been paid over a sufficient length of time or with an explicit promise of future payments, thereby creating a reasonable expectation among employees that the payment will be received as part of their remuneration from employment.[8] Here, we consider a first and only stock giveaway for which both the decision to make the gift and the method by which it would be made were created not by the Respondent, but by its parent corporation.[9] Also, *United Shoe Machinery* concerned stock awards given on an individual basis in "recogni[tion of] long continued service[.]" Id. at 1321. As such, each individual award of stock was an award in recognition of the recipient's achieving an advanced seniority level with the employer. Here, in contrast, the stock giveaway was predicated upon Westlake's IPO, an event wholly unrelated to any work performed or seniority attained by the Respondent's employees. While all eligible recipients had to serve a minimum of one year in order for the stock right to vest, it can scarcely be said that the stock was an award in recognition of that term of service. For all these reasons, *United Shoe Machinery* does not affect our decision here.[10]

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[8] See, e.g., *Waxie Sanitary* Supply, 337 NLRB 303, 303–304 (2001), and *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 174 (1979), enfd. 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980).

[9] This is not to suggest that a bonus cannot be a mandatory subject of bargaining simply because it results from a corporate parent's decision. However, the origin and purpose of the one-time Westlake stock award are relevant in an overall assessment of its ties to employment-related factors.

[10] In *Exxel/Atmos, Inc.*, 323 NLRB 884, 885 (1997), enf. denied 147 F.3d 972 (D.C. Cir. 1998), the Board stated that "a bonus paid to employees, at Christmas or otherwise, is a condition of employment and the proper subject of collective bargaining." This statement went beyond the facts of the case, and was therefore dictum. Further, the statement must be viewed in context. The Board's use of the term "bonus" in the above-quoted passage from *Exxel/Atmos* was immediately followed by a discussion of *Niles-Bement-Pond Co.*, 97 NLRB 165 (1951), enfd. 199 F.2d 713 (2d Cir. 1952), in which the Board found that a "bonus" arrangement pursuant to which the employer, over a period of 12 years, had paid employees "compensation directly related in amount and supplementary to their wages or earnings," constituted wages, notwithstanding the fact that the annual supplemental payments occurred at Christmas time. 97 NLRB at 166. The Board there specifically defined a "bonus" as "'not a gift or gratuity, but a sum paid for service, or upon a consideration in addition to or in excess of that which would ordinarily be given.'" Id. at fn.3 (quoting *Kenicott v. Wayne County*, 16 Wall. 452, 471). Read in context, the language in *Exxel/Atmos* is reconcilable with Board precedent. This is especially so given the Board's mention of the respondent's concession that the bonus in *Exxel/Atmos*, unlike the stock award here, was tied to a specific work-related factor, i.e., the employees' increased sales perform-

The General Counsel and the Charging Party argue that the gift analysis applies only to items of token value. In their view, any benefit of substantial value given by an employer to an employee is a mandatory subject for bargaining with the employee's union representative. Even applying the gift analysis, the General Counsel and the Charging Party argue that the Respondent's stock award was tied to both seniority and work performance. They assert that the 6-months-of-service eligibility requirement tied in to seniority, and that the additional-6-months-of-employment vesting requirement tied in to employee work performance. They also contend that certain comments in the memorandum announcing the award tie the stock award to employee performance. We disagree.

First, the gift analysis set forth above is not limited to items of token value. By its own terms, the analysis applies regardless of the amount involved. See *NLRB v. Wonder State Mfg. Co.*, supra, at 213. Moreover, the Board has applied this analysis in cases where the payments in issue were clearly of significant economic value. See *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 613 fn.9 (1990) (paid vacations to Hawaii were a reward for good work and as such constituted wages); accord *Wonder State Mfg. Co.*, 344 F.2d at 213 (bonus of one week's wages constituted a gift). The Board has never found that an ostensible gift constituted wages solely because of the value of the gift.

Second, as previously discussed, the stock award was not tied to seniority. To establish this link, the seniority of employees must either be proportionately related to the amount received, see, e.g., *Freedom WLNE-TV*, supra (formula based in part on years of service); see also *Electric Steam Radiator Corp.*, 136 NLRB 923 (1962), enfd. 321 F.2d 733 (6th Cir. 1963) (bonus amount based on length of service), or the stock must be given *in recognition of* an employee's attaining a specific level of seniority. See *United Shoe Machinery*, 96 NLRB at 1321 (stock award authorized to "recognize long continued service by [] employees in a substantial way"). Here, there is no relationship between the employees' relative seniority and the amounts they received. Indeed, all eligible employees received the same amount of stock without regard to their seniority. Nor was the stock given to employees in recognition of their attaining any particular level of seniority.

Third, the stock award was not tied to work performance. While vesting of the award was conditioned upon continued employment for 6 months, the award was not dependent on the quality or quantity of work performed during that period or indeed any period. Compare *Mr. Potty, Inc.*, 310 NLRB 724, 726 (1993) (eligibility for bonus tied in to 39 different performance factors, "substantially all" of which must be met). Likewise, Westlake's statements that the award was made "in recognition of…the significant contribution made by each [employee]" and in "appreciation for [employees'] efforts" do not relate the award to any discrete and specific work performed by the Respondent's bargaining unit employees. As such, they have little to do with the level at which or the manner in which these employees performed their work. As discussed above, the grant of stock was tied to the IPO. The IPO, in turn, was linked to Westlake's "growth and success," and that, in turn, was linked to the "significant contribution" of the employees. However, this chain is far too tenuous to support a conclusion that employees were receiving the stock *because of* their performance.[11]

The Charging Party also argues that the Respondent recognized that the award constituted wages when it made provision for withholding amounts necessary to fulfill tax obligations relative to the award. In finding that certain payments constituted wages rather than gifts, the Board has considered employers' decisions to with-

ance during the year. *Exxel/Atmos* does not, however, stand for the proposition that any item of value bestowed upon employees as an act of appreciation, rather than as compensation for services, constitutes wages within the meaning of the Act simply because the gift is called a bonus. Indeed, such an interpretation would negate the *Wonder State Mfg. Co.* standard specifically adopted by the Board in *Benchmark Indus.* See fn. 6, supra ("gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make such payments as he pleases").

[11] Because the issue is not before us, we need not decide whether an employer's payment may be wages if given in recognition of specific collective work performance by the recipient employees. Thus, the dissent's reliance on *Boise Cascade Corp.*, 304 NLRB 94 (1991), is unavailing. In *Boise Cascade*, the employer issued gift certificates to crossover employees. While the employer in its announcement stated that it was "in consideration for their long hours of work and dedication" during a strike which enabled the employer to meet its contract orders, 304 NLRB 95 fn. 6, the gift certificates were issued only after the crossover employees brought to the employer's attention the fact that out of town salaried employees who worked during the strike received compensation for their expenses while the crossovers did not. In these circumstances, the Board found that the issuance of the gift certificates was a term or condition of employment because it was a benefit related to the crossovers' "active employment during the strike." Id. at 96.

We recognize that the Respondent here referred to employees' "contribution" to Westlake's "growth and success." Such generalized statements of appreciation merely demonstrate the employer's good will towards its employees. Prefatory statements of this nature are entitled to little weight in determining whether a payment to employees is tied in to employment-related factors. Moreover, that generalized expression was not tied to any specific service rendered or to any specific period of time, and thus does not transform what is in reality a gift to wages. Quite simply, the stock here was granted in conjunction with the IPO. Absent that event, there would have been no stock gift.

hold taxes from the payments. See *Phelps Dodge Mining Co.*, 308 NLRB at 1000; see also *Radio Television Technical School v. NLRB*, 488 F.2d 457, 460 fn. 3 (3d. Cir. 1973), enfg. *Ryder Technical Institute*, 199 NLRB 570 (1972). Nevertheless, this factor alone is not dispositive. Indeed, in those cases, the withholding of taxes was merely one of many factors supporting findings that the payments constituted wages. See *Phelps Dodge Mining Co.*, supra (one of 6 factors, including clear ties to wages and hours worked, and employer characterizations of the payments as compensation for work performed). Given the absence of such other factors here, the Respondent's provision for tax withholding is insufficient to convert the distribution of stock units from a gift into wages.[12]

Our dissenting colleague repeats many of the arguments advanced by the General Counsel and the Charging Party for finding the stock award to be wages; viz, that it was based on the "employment-related" factors of six months service prior to the award and remaining continuously employed for an additional six months. For the reasons stated above, we disagree. The dissent, making an argument not advanced by either the General Counsel or the Charging Party, also argues that the stock award was conditioned on the nature of the employees' service in that only regular full-time employees were eligible. Our colleague infers from this condition that the Respondent determined that only those employees were deserving based on their work schedules and longer working hours—an "assessment" based on working hours. We find the evidence insufficient to support such an inference.

In fact, Westlake, not the Respondent, determined the regular full-time eligibility requirement, and there is no record evidence of its reasons for doing so, much less any evidence that the requirement was specifically related to work performed by the Respondent's regular full-time workforce. Thus, the General Counsel has not shown (or contended) that this qualification was an "assessment" based on working hours. Indeed, the record does not show whether any employee was excluded from the award because of this provision, or that the Respondent even had any employees who were not "regular" and "full time." For these reasons, the requirement that gift recipients be regular, full-time employees does not establish that the award was "so tied to the remuneration which employees received from their work that [it was] in fact a part of it. . . ." *NLRB v. Wonder State*, supra, 344 F.2d at 213.

[12] There is no suggestion, and indeed it is counter-intuitive, to conclude that the IRS, in deciding whether to tax, would be bound by the same considerations that bear on the issue of whether the matter is bargainable under the Act.

For the foregoing reasons, we find, in agreement with the judge, that the Westlake IPO stock award was a gift and was not a mandatory subject of bargaining that required Respondent to give notice to and bargain with the Union about it. Accordingly, we conclude that the Respondent's unilateral award of stock units to bargaining unit employees did not violate Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, North American Pipe Corporation, Van Buren, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The Respondent's unilateral award of 100 shares of company stock to certain employees was not a "gift." The grant of the stock award, worth approximately $1450 at the time, was tied to "employment-related factors," including an employee's past and future service and working hours, and therefore constituted a form of wages. Accordingly, the stock award was a mandatory subject of bargaining and the Respondent's unilateral action violated Section 8(a)(5) and (1) of the Act.

I. BACKGROUND

In conjunction with an initial public offering of company stock, the Respondent unilaterally granted 100 shares of stock to employees, including 45 bargaining-unit employees, in recognition of the event and "the significant contribution made by each [employee] toward the growth and success of the company."[1] But the Respondent did not recognize every employee's contribution to its growth and success. An employee received the stock award only *if* he was a regular employee, *if* he worked full-time, *if* he had at least 6 months' of continuous service, and *if* he remained a regular, full-time em-

[1] The majority correctly observes that the stock award was initiated by the Respondent's corporate parent, Westlake Chemical Corporation. However, the Respondent has not argued that it is a distinct legal entity from Westlake for purposes of this case, or that it otherwise bears no liability under the Act for this reason.

ployee for an additional six months. If an employee failed to meet any one criterion, he received nothing.

II. WAGES BROADLY DEFINED

The term "wages," as used in Section 8(a)(5) and (d) of the Act, broadly encompasses "emoluments of value arising out of the employment relationship." *Inland Steel Company*, 77 NLRB 1, 4 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949). Employer payments to employees fall within this broad definition if they are linked to an "employment-related factor," including, but not limited to, wage rates, production, performance, seniority, or hours worked. See generally *Benchmark Industries*, 270 NLRB 22 fn. 5 (1984), enfd. sub nom. *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985) (table).

As indicated, an employer payment need only be related to one employment-related factor to constitute wages. In *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951), for example, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally withholding from a 25-year employee a fixed award of 10 shares of stock earmarked for employees who accrued 25 years of continuous service. The Board rejected the employer's argument that the stock award was merely a gift or a gratuity not subject to bargaining. The Board expressly adopted the judge's reasoning:

> [T]he bonus grant of stock is an emolument of value, a perquisite earned by reason of the employment relationship. As such, it comes within the statutory definition of "wages" and is, therefore, an appropriate subject of bargaining between employer and employees.

United Shoe Machinery, supra, 96 NLRB at 1326. The stock award constituted wages even though it bore no relation to an employee's individual wage rate, production, performance, or hours worked.[2]

Moreover, an employer payment may constitute wages even when it is designed to recognize employees' collective effort as opposed to employees' individual achievements. In *Exxel/Atmos, Inc*., 323 NLRB 884, 885-886 (1997), enf. denied 147 F.3d 972 (D.C. Cir. 1998), the Board found that an unprecedented $100 Christmas bonus granted to all employees constituted wages. As the Board explained, "[i]t is well-settled Board law that a bonus paid to employees, at Christmas or otherwise, is a condition of employment and the proper subject of collective bargaining." 323 NLRB at 885. The employer had not derived the $100 bonus amount from any specific formula. Indeed, there apparently was no evidence that the $100 bonus was linked in any way to an employee's individual wage rate, production, performance, seniority, or hours worked. The employer simply granted the uniform bonus to show its "appreciation for the increased sales generated by the employees" as a whole during the year. Id.[3]

II. THE RESPONDENT'S STOCK AWARD CONSTITUTED WAGES

The Respondent's stock award constituted wages subject to bargaining with the Union. As the employer did in *Exxel/Atmos*, the Respondent granted employees a uniform bonus in recognition of their collective contribution to the employer's financial success. The employer in *Exxel/Atmos* wanted to recognize its employees' contribution to its increased sales for the year; the Respondent wanted to recognize "the significant contribution made by each [employee] toward the growth and success of the company." These parallels in the employers' methods and reasons for rewarding their respective employees' collective efforts weigh heavily in favor of a finding that, like the Christmas bonus in *Exxel/Atmos*, the stock award here constituted wages.[4]

Moreover, additional aspects of the Respondent's stock award present an even more compelling case for finding a violation than in *Exxel/Atmos*. The Respondent actually applied specific "employment-related factors" to select award recipients. The Respondent reserved the stock award for employees who had contributed a minimum period of continuous service to the Respondent. An employee had to have at least six months of continuous service to be eligible for the award. Further, the employee's actual receipt of the award was conditioned on

[2] The majority argues that *United Shoe Machinery* is distinguishable because, there, the employer had regularly granted the stock award for 25 years and it was tied directly to a specific length of service. The "regularity" factor is not a distinguishing feature. That factor surely is significant where an employer unilaterally *discontinues* an award. But, for obvious reasons it cannot logically be deemed a prerequisite to a finding that a first-time stock award constitutes wages. Further, as shown below, an employee's receipt of the Respondent's stock award did depend on the employee having worked continuously for the Respondent for a minimum period of time.

[3] The D.C. Circuit disagreed with the Board's finding that the $100 Christmas bonus constituted wages, in part because the court concluded that the Board had failed to adequately weigh the absence of evidence that the employer had previously granted such a bonus. This is the same "regularity" factor on which the majority seeks to distinguish *United Shoe Machinery*, supra. Again, this factor is more applicable to cases in which an employer discontinues a bonus than to first-time bonus cases. For this reason, among others, I respectfully disagree with the court's analysis.

[4] The majority's laborious attempt to distinguish *Exxel/Atmos* is not convincing. As the majority points out, a key fact in *Exxel/Atmos* was that the employer was rewarding the employees for the employer's increased sales performance over the preceding year. As discussed, this establishes a parallel, not a difference, with the instant case.

his remaining continuously employed by the Respondent for an additional six months. Thus, the Respondent decided that the award should go only to those employees who had completed a year of continuous employment with the Respondent. Surely, "employment-related factors" must at least include remaining continuously employed for a minimum period of time.

The requirement that employees remain continuously employed beyond the date of the Respondent's announcement of the stock award is particularly significant for two additional reasons. First, the requirement is inconsistent with the common understanding of a "gift" as being something given "with no strings attached." *Benchmark Industries*, supra, 270 NLRB 22 (classifying employer-provided Christmas dinners and hams as "gifts with no strings attached"); see also Merriam-Webster's Collegiate Dictionary, p. 491 (10th ed. 1999) (defining a gift as "something voluntarily transferred from one person to another without compensation"). The Respondent's insistence that employees remain continuously employed for an additional six months plainly was a significant "string," as it precluded employees from accepting other employment, retiring, taking leaves of absence, etc., if they wanted to receive this significant payment.

Second, the requirement that employees accrue an additional six months of continuous service indicates that the Respondent's stock award was a form of deferred compensation. The stock award rewarded employees' past service but the delayed-vesting component of the award served as an incentive to encourage employees' future service as well. Thus, an employee could not claim the Respondent's "gift" unless he satisfied a predetermined period of additional continuous employment. In this respect, the stock award was akin to other forms of deferred compensation that become available to employees only upon the completion of some defined period of service. See *Exxel/Atmos*, supra, 323 NLRB at 886; see also, e.g., *Midwest Power Systems, Inc.*, 323 NLRB 404 (1997) (current employees' medical benefits upon retirement are a mandatory subject of bargaining), remanded on other grounds 159 F.3d 636 (D.C. Cir. 1998) (table).

Further, the Respondent's stock award was conditioned not just on an employee's continuous service but, also, on the nature of his service. The Respondent granted the stock award only to regular, full-time employees. The Respondent excluded temporary employees, part-time employees, casual employees, etc. Implicitly, the Respondent determined that regular, full-time employees were more deserving of the award, based on their work schedules and longer working hours, than other classes of employees. This clearly was an assessment based on the "employment-related factor" of working hours.[5]

Last, the Respondent's decision to deduct employment taxes from the stock awards, although not determinative, also supports a finding that the awards were a form of compensation. See *Phelps Dodge Mining Co.*, 308 NLRB 985, 1000 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1993). It shows that even the Respondent understood that it was providing additional compensation to certain employees, and not others, for the services they provided as employees.

The majority argues that the stock award cannot constitute wages because the specific amount awarded each employee was not a function of, or derived from an assessment of, his individual wage rate, production, performance, seniority, or hours worked. Certainly, the cases cited by the majority demonstrate that an employer payment will be deemed "wages" when the employer has performed such individualized calculations. However, this is not an indispensable requirement under Board precedent. See *Exxel/Atmos*, supra; cf. *Boise Cascade Corp.*, 304 NLRB 94, 96 (1991) (finding that a uniform $450 gift certificate given to employees as a "thank you" for showing up to work during a strike was a mandatory subject of bargaining).

Further, although the majority correctly notes that the substantial economic value of the Respondent's stock award is not determinative, it is relevant, and it supports a finding that the award constituted compensation. In *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 613 fn. 9 (1990), for example, the Board found that employer-provided vacations to Hawaii were a mandatory subject of bargaining in part because "[t]hese bonuses amounted to a significant economic benefit to individual employees." Cf. *Boise Cascade Corp.*, supra, 304 NLRB at 96 (finding that a $450 gift certificate was subject to bargaining). In contrast, in *Benchmark Industries, supra*, 270 NLRB 22, the Board found that employer-provided Christmas dinners and hams were merely gifts, stating, in part, "we do not believe that the token items involved in the present case can be fairly characterized as compensation." Accord *Stone Container Corp.*, 313 NLRB 336, 337 (1993) (finding that a safety bonus comprised of a

[5] The majority observes that neither the General Counsel nor the record establishes that the Respondent's express reservation of the stock award for regular, full-time employees was in recognition of their greater contribution to its success. The Board, however, may draw "'legitimate inferences from proven facts.'" *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 813 (3d Cir. 1986). To my mind, the Respondent's express purpose to recognize "the significant contribution made by each [employee] toward the growth and success of the company" in combination with its express limitation of the award to regular, full-time employees more than justifies the inference drawn above.

"small amount of food did not rise to the level of a benefit or compensation"). Plainly, the $1450 stock award here is more analogous to a substantial vacation or cash bonus than to a free holiday dinner.

In the end, the majority's approach misses the forest for the trees. This is a situation in which the Respondent decided to show its appreciation to a select group of employees for their contribution to its growth and success. If an employee satisfied the Respondent's past and future service requirements, and the Respondent's regular, full-time requirements, then the employee received 100 shares of stock. If an employee fell short on any one criterion, then he received nothing. The Respondent's all-or-nothing approach demonstrates that the Respondent was not merely celebrating the initial public offering with all its employees. Rather, the Respondent was providing additional compensation to those employees whom the Respondent deemed deserving of it. Consequently, the stock award constituted a form of wages, and the Respondent was not free to grant it unilaterally.

III. THE RESPONDENT DID NOT ESTABLISH A WAIVER

Finally, in agreement with the General Counsel and the Charging Party, I find that the judge erroneously concluded that the Union waived bargaining over the stock award. In finding a waiver, the judge relied on Article XI of the parties' collective-bargaining agreement. Article XI covers wage rates and provides, in pertinent part:

> [N]othing in this Agreement shall be construed as preventing the Company in its discretion from paying employees in a department a higher rate and/or improving a benefit (whether it be an enhancement of the current benefits or a reduction in the premium contribution) than the employees in the department would otherwise be entitled to under this Agreement.

The judge found that by this provision the Union clearly and unmistakably waived its right to bargain over awards of company stock to employees. I disagree.

The Board will not lightly infer a waiver of a statutory right. See *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). Such a waiver must be clear and unmistakable. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Respondent has not carried its burden here.

Article XI of the parties' agreement does not mention stock awards, let alone the granting of such awards on a company-wide basis. It expressly deals only with the Respondent's discretion to improve departmental wage rates and benefits. Nor is there any evidence that the parties discussed awards of company stock in negotiating the language of Article XI. Indeed, all agree that the Respondent's stock award was unprecedented. In these circumstances, I find that the evidence does not support the judge's finding that the Union clearly and unmistakably waived its right to bargain over such awards.

In finding to the contrary, the judge relied on *Johnson-Bateman Co.*, 295 NLRB 180 (1989), in which the Board found that a contract provision giving the employer discretion to grant any "additional pay or benefits" to employees constituted a waiver of the union's right to bargain over an attendance incentive bonus plan. Id. at 189. In *Johnson-Bateman*, however, the Board emphasized that the contract provision giving the employer discretion to grant additional pay was "without qualification." Id. Here, in contrast, Article XI expressly addressed only departmental wage rates and benefits. And, as the General Counsel argues, it appears that, as to benefits, the parties intended only to address then-existing benefits, which the stock award clearly was not.

IV. CONCLUSION

The Respondent unilaterally granted certain employees $1450 worth of company stock to demonstrate its appreciation for their contribution to its growth and success. As demonstrated, the Respondent separated the recipients of the award from the nonrecipients on the basis of continuous service and working hours. Thus, the stock award was not a "gift," but a form of additional compensation subject to bargaining with the Union, which did not waive its right thereto. Accordingly, I dissent from the majority's refusal to find that the Respondent's unilateral action violated Section 8(a)(5) and (1) of the Act.

Dated, Washington, D.C. July 31, 2006

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Rosalind Eddins, Esq., for the General Counsel.
L. Chapman Smith, Esq., for the Respondent.
Ira Jay Katz, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Smith, Arkansas, on January 13 and 14, 2005. The original charge in Case 26–CA–21773 was filed by Unite Here, AFL–CIO, CLC (the Union) on July 6, 2004,[1] and amended on September 30, 2004. The original charge in Case 26–CA–21833 was filed by the Union on August 26, 2004 and amended on October 27, 2004. Based upon the allegations contained in these amended charges, the Regional Director for

[1] All dates are 2004 unless otherwise indicated.

Region 26 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing on November 30, 2004. The complaint alleges that North American Pipe Corporation (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by maintaining an unlawful no-solicitation rule, by prohibiting employees from distributing union literature on the Respondent's parking lot,[2] and by selectively and disparately enforcing a rule in its employee handbook. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by awarding 100 shares of stock to employees without notice to or bargaining with the Union. Respondent filed a timely answer to the complaint denying the alleged unfair labor practices.

On August 23, 2004, Forest Caple, an individual, filed a petition in Case 26-RD-1107 seeking an election to determine whether the Union should remain the exclusive collective bargaining representative of Respondent's employees, in a unit of production and maintenance employees and truck drivers employed at Respondent's Van Buren, Arkansas facility. On January 11, 2005, the Regional Director entered an order, consolidating cases 26–CA–21773, 26–CA–21833, and 26–RD–1107 for the purpose of a hearing before an administrative law judge. After the conclusion of the hearing, I ordered that case 26–RD–1107 be severed from cases 26–CA–21773 and 26–CA–21833 and remanded to the Regional Director for Region 26. Accordingly, I have made no findings with respect to Case 26–RD–1107.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures polyvinyl chloride piping products at its facility in Van Buren, Arkansas, where it annually sells and ships goods valued in excess of $50,000 to points located outside the state of Arkansas. Annually, Respondent purchases and receives at its Van Buren, Arkansas facility, goods valued in excess of $50,000 from points located outside the state of Arkansas. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I also find the following employees of Respondent to constitute a unit[4] appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of its Van Buren, Arkansas plant, including truck drivers, but EXCLUDING office clerical employees, plant clerical employees, guards, laboratory technicians, professional, employees, inspectors, supervisors as defined in the Act and all other employees excluded by law.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, a subsidiary of Westlake Chemical Corporation, operates several facilities throughout the United States, including a plant in Van Buren, Arkansas, where it manufactures polyvinyl chloride piping products. In addition to the Van Buren facility, Respondent also has plants in Litchfield, Illinois; Calvert City, Kentucky; Wichita Falls, Texas; Lake Charles, Louisiana; Gelsmar, Louisiana; Booneville, Mississippi; Greensboro, Georgia; Springfield, Kentucky; Evansville, Indiana, Bristol, Indiana; Leola, Pennsylvania; and Pawling, New York. The employees at Respondent's Calvert City, Kentucky facility are also represented by a labor organization. The Union represents approximately 50 production and maintenance employees at the Van Buren facility. The most recent contract between the Respondent and Union was effective from November 20, 2001 to October 31, 2003. The agreement provides that the contract continues in effect from year to year unless either party gives written notice of a desire for changes in or termination of the agreement at least 60 days prior to the anniversary date.

On October 7, 2003, Union Regional Director Jean Harvey sent a letter to Respondent, requesting the reopening of the contract for the purpose of modification and amendment. In a letter dated October 14, 2003, Steven Edwards; Respondent's Corporate Human Resources Manager, notified the Union that its request to reopen the contract was untimely as it was outside the requisite 60-day period. By letter dated January 2, 2004, the Regional Director for Region 26 notified Respondent that a petition had been filed to decertify the Union. On January 9, 2004, the Region notified all parties concerning the status of the petition. Specifically, the Region's letter explained that based upon the Union's October 7, 2003 letter and Respondent's October 14, 2003 letter, as well as the Union's failure to timely

[2] The consolidated complaint alleged that on or about June 23 and 30, 2004; Plant Manager Danny Ming prohibited an employee from distributing union literature to other employees on Respondent's parking lot. During the hearing, I granted Counsel for the General Counsel's motion to amend the complaint to add Ray Dudley as a supervisor and/or agent of Respondent and to allege an additional 8(a)(1) violation that on or about late August 2004, Dudley prohibited employees from distributing union literature to other employees on the Respondent's parking lot. Respondent admits that Dudley is a supervisor/agent but denies the alleged 8(a)(1) violation.

[3] On February 3, 2005, and after the close of the hearing, counsel for the Union moved to supplement the record to add the listing of basic hourly wage rates for the Van Buren plant that had been inadvertently omitted from the collective-bargaining agreement previously admitted into evidence as GC Exh.. 2. Counsel for the General Counsel joined in the motion and the motion was unopposed by Respondent. There being no objection, the basic hourly wage rates identified as Exh. A to the collective-bargaining agreement is received into evidence to supplement GC Exh. 2.

[4] In its answer to the consolidated complaint, Respondent admits that there was a labor agreement between the Union and Respondent for the period from November 20, 2001 through October 31, 2003. While Respondent does not specifically admit the appropriateness of the unit as alleged, there is no record evidence to the contrary.

reopen the record, the contract served as a bar to any election at that time.

B. The Union's Handbilling

Union Representative Ray McKinney testified that because the Union missed the opportunity to negotiate in 2003, the Union began preparing for 2004 negotiations in June 2004. On June 23, McKinney began distributing handbills to employees in Respondent's parking lot. Union Secretary/Treasurer Daleva Sullentrup and Union President Steve Tabor accompanied him. While Tabor is employed as a first shift operator at Respondent's Van Buren facility, he was not on duty on June 23. There is no dispute that Plant Manager Danny Ming informed Tabor and the union representatives to leave the parking lot and to take their handbilling to the sidewalk. McKinney testified that Ming informed him that if they did not leave the parking lot, he would contact the police.

On June 24, Ming issued a memorandum to all employees concerning the Union's handbilling. In the memorandum, Ming reminded employees that the contract provides that the Union "shall be granted reasonable access to the working areas of the plant, during working hours *for the purpose of investigation of a grievance* arising under the terms of this agreement." Ming explained that the contract does not allow the Union to come onto plant property unannounced to conduct "their business." Ming not only referenced the company policy concerning plant visitors, but also reminded employees "the Company Solicitation policy protects you from being confronted by anyone and asked to accept literature and/or participate in any non-work related endeavor."

In the memorandum, Ming also noted that some of the information distributed by the Union included the statement: "Last year the company said that we didn't need a raise." Ming explained that this was not true and that it was not the Company's fault that the contract was not open for negotiation. He went on to explain that it was the Union who failed to request a new contract.

When Tabor again handbilled in the parking lot on June 30, Ming asked him if he were soliciting. Tabor responded that he was handing out leaflets. Ming told him to take his solicitation to the sidewalk. Ming confirmed that he observed handbilling in the parking lot on two to four occasions. He testified that he did not recall if employees were present with the Union representatives each time. He did recall at least one occasion when Tabor was present with the union representatives. He acknowledged that he asked Tabor and the representatives to leave the parking lot and that he threatened to call the police if they did not do so.

The record reflects that Tabor and McKinney additionally handbilled in the parking lot in late August when Respondent's Manufacturing Manager Ray Dudley visited the Van Buren plant. Dudley does not deny that he also told the handbillers to refrain from handbilling in the parking lot. Tabor testified that he and the other handbillers moved to the sidewalk after speaking with Dudley.

C. The Union's Grievance

On July 14, 2004, Tabor filed a grievance alleging: "Violation of National Labor Relations Act: Employer denying employee access to company parking lot to pass out union information to fellow employees during the employee's off time (off the clock)." Ming responded to the grievance on July 16, 2004. In his written response, Ming explained that because the plant parking lot is company property, it is covered under the "no solicitation" policies maintained by "both the plant and the Company." In support of his position, Ming cited not only the Van Buren "Plant Work Rules," but also the North American Pipe Corporation "Rules of Conduct" that prohibits "solicitation on company premises without authority or during regular work hours." Additionally, Ming asserts that the North American Pipe Corporation "Rules of Conduct" prohibits "starting or nurturing false, malicious rumors or information about fellow workers, the company, or its products." Ming stated that the material[5] distributed by the Union was false and malicious. In further support of Respondent's position, Ming asserted that the contract reserves the right of management to require employees to observe Respondent's rules and regulations not inconsistent with the contract and he cited the contract section that gives the Union reasonable access to the plant "for the purpose of investigating grievances."

After Respondent raised a timeliness defense to the processing of Tabor's grievance, the Union withdrew the grievance.

D. Respondent's Corporate and Plant Rules

The plant rules for the Van Buren plant contain various infractions for which disciplinary action may result. Section B of the rules contains infractions that, depending upon the severity, may lead to discipline ranging from a verbal warning to a disciplinary layoff. Item B. 12 provides:

> SOLICITING OF OR BY EMPLOYEES FOR SALE OF ANY ITEM OR THE COLLECTING OF FUNDS IS NOT PERMITTED WITHOUT THE WRITTEN AUTHORIZATION FROM THE PLANT MANAGER.[6]

The North American Pipe Corporation's 2003 handbook provides:

> People are often annoyed by solicitation on the job. Such activities can interfere with work or quality of our product. Under the circumstances, we have established rules that forbid solicitations (except those sponsored by the company) or the distribution of literature during work time and in work places. Also, to keep work areas clean and orderly, we cannot allow the distribution of literature in work areas.[7]

The 2003 employee handbook also lists a series of rules for acceptable conduct. The handbook provides: "Failure to abide by the rules can lead to some form of corrective action up to and including discharge." Included in the list of unacceptable actions is: "Solicitation on company premises without authority

[5] Ming specifically referenced the handbill's language "the Company said that (employees) didn't need a raise."

[6] GC Exh. 12.

[7] GC Exh. 6, p. 37.

or during work hours."[8] Also listed as unacceptable action is: "Starting or nurturing false, malicious rumors or information about fellow workers, the company, or its product."[9]

E. Whether Respondent Maintained an Unlawful No-Solicitation Policy

Paragraph 6 of the complaint alleges that since about February 25, 2004, Respondent has maintained a provision in its corporate employee handbook that "solicitation on company premises without authority or during regular work hours" constitutes a violation of its Rules of Conduct.

As the Board reiterated in *A.P. Painting & Improvements, Inc*., 339 NLRB 1206, 1207 (2003), "A rule that prohibits union solicitation or activities on 'company time' is overbroad and presumptively invalid because it could reasonably be construed as prohibiting solicitation at any time, including break times or other nonwork times." See also *M.J. Mechanical Services, Inc*., 324 NLRB 812, 813 (1997); *Gemco*, 271 NLRB 1190 (1984). The long established principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Additionally, the validity of a no-solicitation rule turns on whether the prohibition applies only to time the employees are working at their jobs. If so, the rule is presumptively valid. If the prohibition, however, covers all working hours, the rule is presumptively invalid. *St. Mary Medical Center*, 339 NLRB 381, 385 (2003).

Respondent does not dispute that the employee handbook prohibits "solicitation on company premises without authority or during regular work hours." Respondent contends, however, that such a statement in a bullet-point list of "unacceptable actions" is merely a shorthand summary of the complete no-solicitation, no-distribution rule found on a different page of the employee handbook. Specifically, the section of the handbook upon which Respondent relies includes: "People are often annoyed by solicitation on the job. Such activities can interfere with work or quality of our product. Under the circumstances, we have established rules that forbid solicitations (except those sponsored by the Company) or the distribution of literature during work time and in work places. Also, to keep work area clean and orderly, we cannot allow the distribution of literature in work are as."

Respondent argues that its complete rule found on page 37 of the employee handbook governs the short version cited on page 34 of the handbook. Relying upon *Mediaone of Greater Florida, Inc*., 340 NLRB 227 (2003), Respondent argues that the Board has held under virtually identical facts that employees would reasonably believe that a company's no-solicitation policy would be that set forth in full in an employee handbook rather than the handbook's shorthand summary of the rule. As in the present case, *Mediaone* dealt with an employee handbook that included two sections pertaining to a prohibition for solicitation. In *Mediaone*, the employee handbook included a 35-page section entitled "Business Integrity and Ethics Policies." There was not only a title page, but also a two-page table of contents entitled "Business Integrity and Ethics Policies At a Glance" that paraphrased each policy and listed the page number where the full policy could be found. One of the policies paraphrased in the "At a Glance" section involved employee solicitation, stating "You may not solicit employees on company property" and included the page number for the full policy. The parties did not dispute that the full policy was valid on its face. The Board determined that employees would reasonably find that the respondent's no solicitation rule was the one referenced in the summary and not the summary itself.

I find the facts of this case distinguishable from those in *Mediaone*. In the instant case, the provision of the employee handbook that prohibits solicitation "on company premises without authority or during regular work hours" is listed as a separate rule under the Rules of Conduct in the corporate handbook. The preface to the Rules of Conduct states that failure to abide by the listed rules can lead to some form of corrective action up to, and including, discharge. Neither the preface nor the Rules of Conduct reference the Solicitation/Distribution of Literature found on page 37 of the handbook. Unlike *Mediaone*, there is nothing to direct employees to a more fully explained or less restrictive solicitation policy. The lack of reference to a full and valid solicitation policy prevents a finding that the provision at issue is simply a shorthand summary of a valid rule. Interestingly, however, the otherwise valid solicitation policy found on page 37 references the fact that Respondent has established rules that prohibit solicitations and thus arguably references the invalid rule. Based upon the language found in both sections, there is no reason to conclude that employees would reasonably understand that the language found on page 37 is controlling rather than the no solicitation policy on page 34 that threatens discipline if violated. Thus, unlike the circumstances found in *Mediaone*, the two handbook passages referencing Respondent's no-solicitation policy do not lend themselves to interpretation as one solicitation policy.

The employee handbook provides on page 34 that solicitation on company premises without authority or during regular work hours is an unacceptable action and is subject to disciplinary action. In *MTD Products, Inc*., 310 NLRB 733 (1993), the Board found that an employer's rule prohibiting solicitation or distribution on company premises unless approved by the company to be presumptively invalid and overly broad. The Board went on to explain that an employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way as to convey an intent to clearly permit solicitation during break time or other periods when employees are not actively working. See *Our Way, Inc*., 268 NLRB 394 (1993); *T.R.W. Inc*., 257 NLRB 442, 443 (1981). Respondent has not only failed to make such a showing but the evidence demonstrates that the Respondent specifically applied its overly broad no solicitation policy to Tabor's activities while off duty and required him to leave company property when he attempted to handbill on behalf of the Union. Accordingly, I find that Respondent has main-

[8] GC Exh. 6, p. 34.
[9] GC Exh. 6, p 35.

tained[10] an overly broad rule against solicitation in violation of Section 8(a)(1) of the Act.

F. Whether Respondent Unlawfully Prohibited Employees from Handbilling

Paragraph 7(a) of the complaint alleges that Plant Manager Danny Ming on or about June 23 and June 30 prohibited an employee from distributing union literature to other employees on Respondent's parking lot. Paragraph 7(b) alleges that Operations Manager Ray Dudley, in late August prohibited employees from distributing union literature to other employees on the Respondent's parking lot. There is no factual dispute that both Ming and Dudley asked Tabor to leave the parking lot when he was handbilling for the Union. The issue, however, is whether Respondent's agents acted lawfully in this prohibition.

In response to the Union's grievance, Ming stated that the parking lot is company property and thus covered under the "no solicitation" policies maintained by both the plant and the company. The Board has determined that a "no access" rule is valid only if it (1) limits access solely with respect to the interior of the plant [or] other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except where justified for business reasons, "a rule which denies off-duty employee entry to parking lots, gates, and other outside nonworking areas will be found invalid." *The Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117, slip op. at 13 (2004); *Tri-County Medical Center*, 222 NLRB 1089 (1976). Accordingly, Respondent offered no justified business reason for requiring Tabor to leave Respondent's parking lot other than the application of its unlawful no-solicitation rule.

Respondent argues that it lawfully prohibited employee Tabor and Union Representative McKinney from distributing Union literature on Respondent's property in June 2004. Relying upon the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), Respondent asserts that the Act confers Section 7 rights only on employees, not on unions or their nonemployee organizers. Respondent argues that Section 7 rights are not enlarged by the presence of an employee during a nonemployee union representative's distribution of union literature on company property. Respondent further asserts that the nonemployee's presence actually diminishes the employee's Section 7 rights. Citing *NLRB v. Cranston Print Works Co*., 258 F.2d 206, 213 (4th Cir. 1958), Respondent further asserts that an employee forfeits any special right to enter an employer's property, such as the employer's parking lot, and distribute union literature when the employee is accompanied by a nonemployee union representative. I note that the case cited by Respondent dealt with the employer's application of a nondiscriminatory distribution rule to a nonemployee union representative and an employee who was on an extended leave of absence. Interestingly, the Court distinguished the rights of access for the employee on a leave of absence with those employees who were active employees.

More recently however, the Board has found in similar circumstances that the presence of a nonemployee union representative did not diminish an employee's Section 7 rights. In *Material Processing, Inc.*, 324 NLRB 719 (1997), a nonemployee union representative handbilled with two or three employees on company property. The employer's plant manager approached the union representative and informed him that he could not remain on company property and the union representative and the employees left in response to the directive. The Board found that even if the plant manager only addressed the union representative, it was reasonable for the employees to believe that the plant manager was addressing them as well and that the employer's action constituted a violation of Section 8(a)(1). Contrary to Respondent's argument, the presence of a nonemployee union representative has not prevented the Board in finding a violation of Section 8(a)(1) when an employer evicts employees while engaged in protected activities. See *Trailmobile Trailer, Inc*., 343 NLRB No. 17, slip op. at 14 (2004). By contrast, I note that in the instant case, Ming does not deny that he not only asked Tabor to leave the parking lot, but that he also threatened to call the police if he did not. Dudley acknowledged that when he asked the union representative to leave the parking lot in late August, two other individuals who "had papers in their hands" accompanied the representative. Accordingly, I do not find that McKinney's presence diminished employees' Section 7 rights as asserted by Respondent.

Respondent also argues that a union may waive certain solicitation and distribution rights through a collective-bargaining agreement. Citing *NLRB v. United Techs Corp.*, 706 F.2d 1254, 1263-64 (2d Cir. 1983), Respondent argues that the Second Circuit has held that if employees are free to engage in solicitation during nonworking times, the union has power to bargain away employee rights to engage in solicitation at other times. I note however, that in *United Techs Corp*., there was a contract provision that banned solicitation of union membership or conducting union business on "working hours." The court noted that the provision had been included in the collective-bargaining agreement for many years and that the term "working hours" had been interpreted by all concerned, as well as by an arbitrator 25 years before. The court observed that based upon the testimony at trial, arbitration decisions, and past practice, there was no ambiguity as to "working hours." Respondent asserts that it does not maintain or enforce a total ban on union solicitation and distribution. Respondent asserts that its rule, which it adopted pursuant to a management functions provision in the agreement, allows solicitation and distribution during nonworking time and in nonworking areas. Despite Respondent's assertion, however, the record evidence reflects that during this same period of time, Respondent maintained a rule prohibiting "solicitation on company premises without authority or during regular work hours." As discussed above, I find this to be an unlawful no solicitation rule. Unlike the circumstances found in *United Techs Corp*., there is no evidence that the Union has waived any Section 7 rights by the existence of the management functions clause. Based upon the total record evidence, I find that Respondent violated Section 8(a)(1)

[10] The overall evidence indicates that Respondent maintained this solicitation policy for a period of more than 6 months prior to the filing of the charge. The fact that Respondent maintained the rule outside the 10(b) period does not serve as a defense to the violation, but rather constitutes a "continuing violation."

by unlawfully prohibiting employees from engaging in activity protected by Section 7 of the Act in June and late August and as alleged in complaint paragraph sections 7(a) and (b).

G. Whether Respondent Disparately Enforced a Provision of its Employee Handbook

Respondent's corporate employee handbook includes the following language:

> Rules, Regulations and Procedures for the acceptable conduct of employees are necessary for the benefit and protection of the rights and safety of all employees and for the orderly operation of our business. These rules are normally things that are to be done or things not done in order to have acceptable conduct. Failure to abide by these rules can lead to some form of corrective action up to and including discharge.

In addition to the invalid solicitation rule previously discussed, the list also includes:

> Starting or nurturing false, malicious rumors or information about fellow workers, the company, or its products.

Complaint paragraph 8(b) alleges that about July 16, 2004, Respondent, by Danny Ming, enforced the rule selectively and disparately by citing the rule in response to the Union's July 14, 2004 grievance.

Respondent argues that Section 7 of the Act does not protect distribution of maliciously false information. In support of its position, Respondent cites the Board's ruling in *Sprint/United Management Co.*, 339 NLRB 1012 (2003) wherein an employee sent an e-mail to employees on November 21, 2001, stating that anthrax had been confirmed at the employer's facility. Board Member Liebman noted that the timing and context of the email could not be ignored as it occurred in the midst of widely publicized anthrax deaths and contamination incidents. The Board affirmed the administrative law judge in finding that the e-mail was sent with deliberate falsity and the employee's actions were outside the protection of the Act. Respondent also cites *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1313, 1315 (1994), in which the Board found that a rule prohibiting "false or malicious" statements unduly restricted employees' Section 7 rights because it prohibited merely false statements, as opposed to maliciously false statements. Respondent argues that by contrast, its maintenance of a rule prohibiting maliciously false statements does not interfere with Section 7 rights.

Relying upon the Board's decision in *Sprint/United Management Co.*, Respondent argues that a statement is "maliciously false" and loses Section 7 protection if it is made with knowledge that it is false or with reckless disregard for the truth or falsity of the statement. Respondent's counsel argues that the Union's handbill stated "Last year the company said that we didn't need a raise" and thus wrongly implied that Respondent was responsible for the lack of a wage increase. Counsel further argues that Tabor and McKinney distributed the handbill with full knowledge of their falsity or with reckless disregard for their truth or falsity because they knew that Respondent had never made that statement and that the labor agreement automatically renewed because of the Union's failure to timely request reopening for bargaining.

Citing *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 528 (6th Cir. 1984), Counsel for the General Counsel argues that in determining whether an employer has unlawfully interfered with an employee's Section 7 rights, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees. Counsel for the General Counsel asserts that the Respondent and the Union disagreed as to who was to blame for the unit employees not receiving wage increases in 2003. While counsel for the General Counsel concedes that the Union's literature suggests the Respondent was at fault, Counsel also submits that Ming's June 24 memo to employees states that the Union "forgot" about employees.

In its 1953 decision in *IBEW Local 1229 (Jefferson Standard*), 346 U.S. 464 (1953), the Supreme Court held that employees may engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. Thirteen years later, the Court reiterated that nonmalicious false statements could be protected in the context of a union/management dispute. The Court noted that the Board has given wide latitude to competing parties in a labor dispute and does not "police or censor propaganda," but "leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements."[11] *Linn v. United Plant Guard Workers of American, Local 113*, 383 U.S. 53 (1966). In its decision in *Emarco, Inc.*, 284 NLRB 832 (1987), the Board found that employees' remarks about their employer to be an extension of a legitimate and ongoing labor dispute. The remarks, however, included such statements as "these people never pay their bills" and "it will take a couple of years to finish the job." The Board noted that the definition of labor dispute under Section 2(9) of the Act includes "any controversy concerning terms, tenure or conditions of employment." The employees' failure to specifically reference the labor dispute in their remarks did not remove their remarks from the protection of Section 7 of the Act.

General Counsel argues that Respondent's rule prohibiting starting or nurturing false and malicious rumors or information was applied in the context of employees engaging in protected concerted activity, specifically that akin to union organizing. General Counsel submits that inasmuch as there was a dispute between management and labor concerning who was responsible for employees not receiving a raise, the Union's statement is protected speech within the framework of the Supreme Court's *Linn* decision. As Counsel for the Union points out in his brief, a statement must be made "with knowledge that it was false or with reckless disregard for the truth" in order for it to lose the Act's protection and "overenthusiastic use of rhetoric" is protected. *Long Island College Hospital*, 327 NLRB 944, 947 (1999).

The Union argues that even though the Union failed to give adequate notice of its desire to negotiate a successor contract, Respondent could have nonetheless negotiated a wage increase and by doing so was blameworthy for the lack of a raise. While

[11] *Stewart-Warner Corp.*, 102 NLRB 1153, 1158 (1953).

such an expectation appears to be not only unrealistic, but also highly improbable under such circumstances, the Union's handbill did not, however, offer this potential explanation to employees. The handbill attributed the lack of a raise to the employer by stating "Last year the company said that we didn't need a raise." In response, Ming issued a memorandum to employees on June 24, explaining that the union's statement was not true and that contract negotiations were not instituted in 2003 because the Union failed to request a new contract. Ming went on to explain that the company unsuccessfully tried to get the National Labor Relations Board to agree that there had been no contract renewal.

Based upon the total record evidence, it is apparent that the statements in the Union's handbill were clearly in the context of a labor/management dispute. As envisioned by the Court in *Linn*, Respondent quickly corrected any inaccuracy and presented a full explanation of Respondent's position for employees. While arguably inaccurate, the Union's statement is nothing more than an overenthusiastic use of rhetoric rather than a deliberately malicious statement designed to publicly disparate Respondent's product or to undermine its reputation. *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979). While the Union's statement may be misleading as to why employees did not receive a 2003 wage increase, the record does not reflect that the handbill was distributed with a malicious intent or as a part of a design to deliberately falsify. *San Juan Hotel Corp.*, 289 NLRB 1453, 1455 (1988); *Veeder Root Co.*, 237 NLRB 1175, 1177 (1978). Accordingly, I do not find that the Union's handbill lost the protection of the Act as argued by Respondent.

Having found that the handbill did not lose the protection of Section 7 of the Act, the question turns to whether Respondent selectively and disparately enforced the rule in its response to the Union's grievance. Ming testified that there had been no other occasions when he applied the rule prohibiting "starting or nurturing false, malicious rumors" as contained in the employee handbook. He also testified that one of the reasons that he had not allowed Tabor to handbill in the parking lot was the fact that he received complaints from two employees that the Union was bothering them with the distribution of the handbills. While he identified Chris Wiggins as one of the employees who complained, he could not recall the other employee. Chris Wiggins did not testify and there was no other corroboration of Ming's testimony with respect to employee complaints. Ming acknowledged that he did not question Tabor or McKinney concerning the alleged complaint.

The total record evidence demonstrates that Respondent's enforcement of its prohibition concerning false and malicious rumors was responsive to the employees' distribution of the Union handbills and activity that was protected by Section 7 of the Act. Admittedly, this provision of the handbook had not previously been enforced. Accordingly, I find that Respondent selectively and disparately enforced its rule in violation of Section 8(a)(1) of the Act.

H. Whether Respondent Unlawfully Granted Stock to Unit Employees

Paragraph 10 of the complaint alleges that on about August 16, 2004 Respondent awarded 100 shares of stock to unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct. There is no factual dispute that the shares of stock were awarded to employees without prior notice to or bargaining with the Union. Respondent asserts, however, that the stock award was a gift to employees and not subject to mandatory bargaining.

As referenced above, Respondent has 12 other manufacturing facilities in the United States in addition to its facility in Van Buren Arkansas. As also noted above, a union also represents the employees at Respondent's Calvert City, Kentucky facility. On August 16, 2004, Westlake Chemical Corporation, Respondent's parent company, announced in an interoffice memorandum to all regular, full-time employees that it would award 100 shares of stock to each eligible employee. This announcement was made in conjunction with Westlake's initial public stock offer (IPO) that occurred on August 11, 2004. Respondent informed employees in the memorandum that the stock was given in recognition of the historic company event and the significant contribution made by each employee toward the growth and success of the company. Respondent told employees that the stock was given in appreciation for their efforts. All regular, full-time employees with at least 6 months of service as of August 16 were eligible to receive this one-time stock award. Respondent maintains that the award was not linked to remuneration or an individual employee's job performance, and Westlake awarded the stock based on its financial condition after the IPO. Respondent argues that because the stock was a gift, it was not obligated to engage in bargaining with the Union before issuing the shares to employees. There is no dispute that the stock was given to all eligible employees at all of the Respondent's facilities. Respondent does not dispute that it awarded the stock to employees without notice to or bargaining with the unions that represented employees at other facilities.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." The Supreme Court has interpreted Section 8(d) of the Act to require the employer and the union to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The Court further noted, however, that as to other matters, each party is free to bargain or not to bargain, and to agree or not to agree. Ibid. Accordingly, the initial issue with respect to Respondent's unilateral awarding of stock to employees is a determination as to whether the granting of stock to employees was a mandatory subject of bargaining.

The Board and courts have held that gifts per-se payments that do not constitute compensation for services are not terms and conditions of employment. If such gifts, however, are so tied to the remuneration that employees receive such awards for their work, such gifts are considered wages and within the statute. *Ross Sand Co. Inc.*, 219 NLRB 915 (1975); *NLRB v. Har-*

rah's Club, 403 F.2d 865, 874 (9th Cir. 1968); *NLRB v. Wonder State Mfg. Co*., 344 F.2d 210, 213 (8th Cir. 1965).

In the instant case, all employees, including hourly employees, supervisors, and management employees, were given a one-time award of 100 shares of stock based upon Respondent's initial public offering. There was no evidence that any other such award was planned or even anticipated for employees.[12] The award was not based upon seniority or productivity. The only eligibility requirement was employment of at least six months duration prior to August 16, 2004.[13] There is no evidence that the stock award was a gift made to employees over a substantial period of time or based upon their respective wages. All individuals received the same amount of stock regardless of whether they were at the highest level of management or the lowest paid hourly employee. The stock award was given to all eligible employees regardless of their work performance, earnings, seniority, production, or other employment related factors. Accordingly, I find that the stock award given to employees on August 16, 2004 constituted a gift and was not a mandatory subject of bargaining that required notice to or bargaining with the Union. See *Stone Container Corp*., 313 NLRB 336, 337 (1993); *Benchmark Industries, Inc*., 270 NLRB 22 (1984), enfd. 724 F.2d 974 (5th Cir. 1984). Accordingly, I not find the Respondent's unilateral award of stock shares to its employees to constitute a violation of Section 8(a)(5) as alleged.

Respondent argues that even if the stock award was not a gift to employees, "the Union waived the right to bargain over wage increases." Article IX of the collective-bargaining agreement provides:

> Wages and rates of pay for the duration of this contract shall be shown by Exhibit A, attached and made a part of this Agreement. The rates of pay specified in Exhibit A are rates which the Company is contractually obligated to pay, but nothing in this Agreement shall be construed as preventing the Company in its discretion from paying employees in a department a higher rate and/or improving a benefit (whether it be an enhancement of the current benefits or a reduction in the premium contribution) than the employees in the department would otherwise be entitled to under this Agreement.

Respondent also relies upon the language found in article XIX providing:

> Section 2. The parties acknowledge that during the negotiations which resulted in the Agreement, each has had the unrestricted right and opportunity to present demands and proposals with respect to any matter subject to collective bargaining. Therefore, the Company and the Union freely agree that during the period of this Agreement, neither part shall be obligated to bargain with respect to wages, pensions, or other fringe benefits in view of the fact that such matters were taken into consideration in settlement of the issues discussed during negotiations, or with respect to not covered or referred to in this Agreement, except in the manner specified herein.

In support of its position that the Union waived its right to bargain about the stock award, Respondent cites the Board's rulings in *Johnson-Bateman Co*., 295 NLRB 180 (1989) and *EPI Corp.*, 279 NLRB 1170 (1986). In *Johnson-Bateman Co*., the collective-bargaining agreement provided that while the wage rates were set forth in the agreement, it was not to be construed as preventing the employer from paying or the employee accepting additional pay or benefits. The employer unilaterally implemented an attendance incentive bonus. The Board found that contractual language was sufficiently clear and specific to establish that the union contractually waived its right to bargain about the attendance incentive bonus. The Board further observed that there was no record evidence that the parties discussed this particular contract provision during negotiations for the existing collective-bargaining agreement. The language in issue had been in each successive contract for 26 years and neither party proposed any changes in the language during negotiations for the current contract. Accordingly, the Board found that the union waived its bargaining rights on this subject based on the express contractual language.

In *EPI Corp*., 279 NLRB 1170, 1173–1174 (1986), the parties negotiated a labor agreement containing a "zipper clause" specifying "all aspects of wages, hours or working conditions which are not covered by this Agreement may be changed, altered, continued, or discontinued without consultation with the Union." The Board noted that while it was not apparent that the parties specifically addressed the issue of midterm adjustments in the health program during contract negotiations, the evidence reflected that the parties negotiated a complete agreement. In summary, the Board found that the union waived its interest in bargaining with respect to the carrier-induced changes in the employees' health benefit plan.

The Union argues that while the collective-bargaining agreement permits Respondent to improve existing, ongoing compensation programs on a department-wide basis, it does not permit one time, plant-wide gifts. The Union acknowledges that the employer prevailed in *Johnson-Bateman*, where, although the contract broadly permitted additional pay, the employer paid only merit increases to individual employees. The Union argues that by comparison to *Johnson-Bateman*, the Board's rulings in *Register-Guard*[14] and *C & C Plywood Corp*.[15] reflect that the Board narrowly construes contract language granting an employer the right to discretionarily increase

[12] In *United Shoe Machinery Co.*, 96 NLRB 1309 (1951), the Board found that the employer's long-established policy and method of granting 10 shares of common stock to every employee with at least 25 days of service was an emolument of value that was earned by reason of the employment relationship.

[13] In *Richfield Oil Corp.*, 110 NLRB 356 (1954), the Board found that employees' membership in a stock option plan was a mandatory subject of bargaining. In addition to the requirement that membership was limited to employees, the Board also found significant the long term accumulation of stock for future needs as well as the provision that the benefits were based upon the employees' length of service as well as the employees' amount of wages while participating in the plan. The Board also noted that employees who were members of the plan performed their work under a pledge from the employer of future payments in the form of company stock as well as ordinary wages.

[14] 301 NLRB 494, 495 (1991).

[15] 148 NLRB 414, 417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. and remanded 385 U.S. 421 (1967).

compensation. The contractual language in *Register-Guard* not only provides that the employer may pay wages in excess of the minimum wage but also specifically addresses the granting and reducing of merit pay. In reviewing the case, the Board considered the fact that at an impasse and throughout negotiations, the wage scale was a point of contention. During impasse, the employer upwardly adjusted wage scales for a portion of the employer's employees. The adjustment was not based upon merit increases but was based upon a local personnel survey. There was no bargaining about the employer's decision to award the increases, which represented the first time that the employer unilaterally increased the wages of an entire classification of employees above contract scale. The Board concluded that the contract language afforded the employer discretion to increases for particular individuals over the wage-scale minimum for their classification rather than the general wage increases for an entire classification of employees.

In *C & C Plywood Corp*., above, the parties negotiated a collective-bargaining agreement providing that the employer reserved "the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like." Without bargaining with the union, the employer subsequently awarded premium pay to a classification of employees provided that they met certain production standards. The Board held that the union did not waive its bargaining right because the clause granted the employer only the right to make individual merit increases for special competence and skill. The Board did not find the award to be premium pay within the meaning of the contractual language, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the union.

The Union acknowledges that its contract with the Respondent permits Respondent to give more general discretionary compensation increases than the language in *Register-Guard* or in *C & C Plywood*. The language provides that nothing in the agreement "shall be construed as preventing the Company in its discretion from paying employees in a department a higher rate and/or improving a benefit (whether it be an enhancement of the current benefits or a reduction in the premium contribution) than the employees in that department would otherwise be entitled to under this Agreement." The union argues, however, that as in *Register-Guard* and *C & C Plywood*,[16] Respondent overstepped its contractual bounds by providing a benefit to almost every employee, rather than by providing an improvement limited to specific departments. The Union argues that the contract language should be interpreted to allow Respondent to discretionarily improve only existing wage rates and existing benefits. While the Union maintains that the contract provision implies that Respondent is limited to improving only an existing benefit, I do not find the language limited to such specificity.

The Union submits: "The 100 stock shares are a brand new benefit. It is not an improvement of a current benefit. There is no similar existing program. There are no references to stock giveaways in any contract article. Moreover, it is a one-time gift. The employees do not continue to enjoy the benefit into the future." As discussed in detail above, I agree, and as discussed above I find that as a gift, the stock award was not a mandatory subject of bargaining. In the event that the stock award is not found to be a gift, the record nevertheless reflects that such increase in benefits was permissible under the express contractual provision as found by the Board in *Johnson-Bateman Co.*, supra, at 189. The fact that the stock award occurred but once does not negate its constituting an increase in benefits as expressly provided in the contractual language.

While the express language in article XI may constitute a waiver with respect to Respondent's obligation to bargain about the stock award, I do not find the "zipper clause" contained in [article] XIX as an effective waiver of the Union's right to bargain about the stock award. The contractual language provides: "The parties acknowledge that during the negotiations which resulted in the Agreement, each has had the unrestricted right an [sic] opportunity to present demands and proposals with respect to any matter subject to collective bargaining. Therefore, the Company and Union freely agree that during the period of this Agreement, neither party shall be obligated to bargain with respect to wages, pensions, or other fringe benefits in view of the fact that such matters were taken into consideration in settlement of the issues discussed during negotiations; or with respect to any matter or subject not covered or referred to in this Agreement, except in the manner specified herein." While the parties may have had an opportunity to bargain during negotiations, there was no contemplation of stock distribution at the time of negotiations and no evidence of any discussion with the Union of any possibility of stock distribution. Accordingly, I do not find article XIX to constitute a waiver with respect to the stock shares award.[17]

Accordingly, I do not find that Respondent unilaterally granted the stock shares in violation of Section 8(a)(5) and (1) of the Act.

I. Whether Deferral of the Complaint Issues is Appropriate

On December 14, 2004, Respondent filed a motion for summary judgment in this matter. In its motion, Respondent asserts that the matters involved in the complaint are more appropriately suited for the grievance-arbitration process as contemplated by the Board in its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). On January 4, 2005, the Union filed a memorandum in opposition to Respondent's motion for summary judgment. By letter dated January 5, 2005, the Board's Associate Executive Secretary informed the Union that its memorandum[18] had not been timely filed and could not be forwarded to the Board for consideration. The motion is pending before the Board.

Respondent argues that the issues raised in the complaint are contractual and thus the interpretation and application of provisions of the collective-bargaining agreement are in dispute. Respondent asserts that while the complaint alleges that it violated Section 8(a)(1) of the Act by maintaining and enforcing a

[16] 148 NLRB 414, 417 (1964), enf. Denied 351 F.2d (9th Cir. 1965), revd. and remanded 385 U.S. 421 (1967).

[17] *Michigan Bell Telephone Co*., 306 NLRB 281 (1992).

[18] The Union's December 27, 2004 e-mail request for an extension of time to file its opposition was not recognized by the Associate Executive Secretary as complying with requisite Board procedures.

no-solicitation rule found in Respondent's handbook, Respondent argues that it had a contractual right to promulgate and enforce this rule. Further, Respondent points out that while its unilateral award of 100 shares of stock is alleged as a violation of Section 8(a)(5) of the Act, Respondent was allowed to do so based upon the language of the contract.

Respondent relies upon a number of cases where the Board has deferred to the grievance-arbitration process. Respondent asserts that in *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 64–65 (2003), the Board found that the parties' agreement was not free from ambiguity and found that the dispute concerning the employer's unilaterally changing unit employees' health insurance was a matter of contract interpretation. The dispute involved in *Radioear Corp*., 199 NLRB 1161 (1972) involved an employer's unilaterally terminating an annual bonus paid to employees. The employer argued that during negotiations the union tried to get a clause preserving all existing benefits and the union argued that there was no intent for the employer to be able to unilaterally discontinue a benefit. The Board determined that interpretation of the "zipper clause" and the collective-bargaining agreement was at the heart of the dispute, and deferred the matter to arbitration. The Board reasoned that an arbitrator could consider "(a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an 'integration'-hence the applicability or inapplicability of the parole evidence rule; and (d) practices by the parties, or other parties, under other collective-bargaining agreements."

Respondent contends that the issues involved in this case are appropriate for deferral because the complaint allegations deal with the Respondent's contractual right to promulgate and enforce rules in the employee handbook and whether Respondent is permitted to unilaterally grant a stock award to employees. In essence, Respondent argues that an interpretation of the contractual language will resolve these issues and thus, a matter appropriate for deferral to the grievance-arbitration procedure. Contrary to Respondent's argument, I do not find the issues involved herein, appropriate for deferral.

There is certainly no question that the parties negotiated and agreed to resolve disputes regarding the application or interpretation of the agreement through arbitration. Article XII of the collective-bargaining agreement sets forth the procedure for resolution of disputes through the grievance-arbitration procedure. In its decision in *Collyer Insulated Wire*, supra, the Board found deferral appropriate when: (1) the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) there was no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issues; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well-suited to resolution by arbitration. Respondent asserts that deferral is appropriate in this matter because all of the criteria have been met.

While a number of these criteria have been met, it does not appear that deferral in this case is appropriate. As discussed above, Respondent argues that it was permitted to grant the stock award to employees because the award constituted a gift and not a mandatory subject of bargaining. Accordingly, Respondent argues that it has not violated Section 8(a)(5) of the Act by failing to bargain with the representative of its employees as required by the Act. This question is resolved by statutory interpretation. While Respondent argues that it was contractually permitted to promulgate and enforce rules in the employee handbook, the lawfulness of Respondent's solicitation provision also involves a matter of statutory interpretation.

The Board's policy against deferral in matters of statutory interpretation is well established. *Avery Dennison*, 330 NLRB 389, 390 (1999). Generally, the Board does not defer an issue to arbitration that involves the application of statutory policy, standards, and criteria, rather than the interpretation of the contract itself. The Board has specifically noted that questions of statutory construction, as distinguished from contract interpretation, are legal questions concerning the National Labor Relations Act, and thus are within the special competence of the Board rather than an arbitrator. *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321, 322 (1998).

The lawfulness of Respondent's maintenance and enforcement of its solicitation rule is in issue, as is the lawfulness of Respondent's granting the stock shares to its employees. An interpretation of the contract will not resolve the legal questions in issue. I note also that even if one of these issues are found to be appropriate for arbitration, Board policy does not favor bifurcation of proceedings that involve related contractual and statutory questions because of the inefficiency and possible overlap that may occur from the consideration of certain issues by both the Board and the arbitrator. *Sheet Metal Workers Local 17 (George Koch Sons*), 199 NLRB 166, 168 (1972).[19] Additionally, there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles. *Carpenters (Novinger's Inc.)*, 337 NLRB 1030, 1034 (2002).

A key element of the Board's deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the merits of the dispute are addressed. *Hallmor, Inc.*, 327 NLRB 292, 293 (1998). The Union asserts that the allegation that Respondent prohibited an employee from distributing handbills in the parking lot is not deferrable because the Respondent pursued its timeliness objection into the arbitration procedure. During the course of the grievance processing, Respondent asserted that the Union did not timely appeal the step-two response from the plant manager. While Respondent later agreed to proceed to arbitration, Respondent sought to also include timeliness as an issue for the arbitrator. By letter dated August 31, 2004, the Union informed Respondent that inasmuch as Respondent persisted in challenging the grievance's timeliness, the Union desired that the matter be resolved by the National Labor Relations Board and informed

[19] The complexity of issues in this case are distinguishable from those in *Wonder Bread*, 343 NLRB No. 14, slip op. at 3 (2004) that involved an employer's unilateral implementation of a physical examination for certain of its employees. The Board found that the employer's reliance upon the management-rights clause for its action created a dispute as to the interpretation of the collective-bargaining agreement.

Respondent that the Union would take no further steps pursuant to the contact's grievance arbitration procedure. By letter dated September 8, 2004, Respondent informed the Union that despite the Union's letter of August 21, 2004, proceeding to arbitration was mandatory under the terms of the contract. Respondent sent a follow-up letter to the Union on October 8, 2004, reiterating that it had agreed to proceed to arbitration on the grievance. Respondent did not, however, retract its desire to have the arbitrator consider the timeliness issue of the Union's grievance. Eventually, rather than waive timeliness, Respondent agreed that the grievance be withdrawn from arbitration, after the parties had chosen an arbitrator.

Respondent asserts in its brief that it is willing to arbitrate these matters and waives any time limits or procedural defects and agrees to submit all aspects of the dispute to arbitration. While Respondent may assert that it will waive the timeliness provision of the contract to present the matter to the arbitrator, Respondent does not assert that it will not pursue the initial timeliness issue as one of those issues to be submitted to the arbitrator. Thus, it appears that despite Respondent's assertion that all elements for deferral have been met; Respondent's challenge to the timeliness of the initial grievance may foreclose an arbitrator's reaching the merits of the issues in dispute. See *Southwestern Bell & Telephone Co.*, 276 NLRB 1053, fn. 1 (1985); *Victor Block, Inc*., 276 NLRB 676, 680 (1985).

Citing *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), counsel for the General Counsel also asserts that where an employer has maintained an illegal handbook at multiple locations, the appropriate remedy should include a posting at every facility where the rule has been in effect. Counsel for the Union submits that the solicitation rule allegation is not deferrable because an arbitrator can impose no remedy at Respondent's facilities other than the Van Buren facility. Citing *Clarkson Industries*, 312 NLRB 349, 351–352 (1993), the Union further argues that when an arbitrator is unable to provide a sufficient remedy, deferral is inappropriate.

Having considered the arguments advanced by counsel for the General Counsel, Respondent, and the Union, I find that deferral is not appropriate in this case and recommend accordingly.

J. The Appropriate Remedy for Respondent's Overly Broad No-Solicitation Rule

Citing a number of cases, the Union submits that where an employer has maintained an illegal handbook at multiple locations, the remedy should include a posting at every facility where the rule has been in effect. *Jack in the Box Center Systems*, 339 NLRB 340 (2003); *Raley's*, 311 NLRB 1244, 1244, fn. 2 (1993); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 fn. 33 (1990). There is no dispute that Respondent's rule prohibiting solicitation on company premises without authority or during regular work hours has been maintained in Respondent's corporate employee handbook. Respondent does not dispute that this handbook was distributed to employees at facilities other than the Van Buren plant.[20] Based upon the total record evidence, it appears appropriate to require the rescission of the overly broad no solicitation provision, and the posting of the notice coextensive with Respondent's application of its handbook.[21]

The Union also argues that in addition to the required posting, Respondent should be ordered to notify employees in writing that the unlawful rule is no longer in effect. Certainly, the Board has found it appropriate to require an employer to publicize the rescission of an unlawful rule in the same fashion that the unlawful rule was publicized. *Ark Las Vegas Restaurant Corp*., 335 NLRB 1284, 1285 fn. 7 (2001); *Marriott Corp*., 313 NLRB 896, 896 (1994). Steven Edwards; manager of corporate human resources, testified that on December 2, 2004, Respondent posted at its Van Buren facility a memorandum to employees concerning Respondent's solicitation rules. In the notice, Respondent informed employees that the solicitation policy in the local plant rules was rescinded. Additionally, Respondent notified employees that the employee handbook provision would immediately read as follows:

> The performance of our employees and the quality of our product can be adversely affected by solicitation or the distribution of literature. Therefore, solicitation during work time and the distribution of literature during work time or in work areas are prohibited.

The memo stated that effective immediately the provision regarding solicitation in the Rules of Conduct "is revised to read as follows:"

> Solicitation during work time, or distribution of literature during work time or in work areas.

Edwards explained that this memorandum was posted on the bulletin board at Van Buren as well as the bulletin boards at Respondent's other facilities. Edwards acknowledged that while there had been a posting of the rescission and modification of the solicitation and distribution policy, there was no distribution to individual employees. He also testified that he was unaware of any meetings with employees to discussion the rescission and modification of the rules. It appears therefore, that an appropriate remedy would require Respondent to disseminate the modification of its solicitation and distribution policy in the same manner in which the original unlawful policy was disseminated to employees. Accordingly, an appropriate remedy would also require Respondent to notify all of its employees, to whom the handbook was disseminated, individually, in a separate document from the posting, that the unlawful rule has been rescinded and modified.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[20] In his testimony, Ming asserted that he relied upon the local plant rules rather than the corporate employee handbook. In his July 16, 2004 written response to the Union's grievance, however, he referred to the corporate rules of conduct prohibiting "solicitation on company premises without authority or during regular work hours."

[21] *Jack in the Box Distribution Center Systems*, supra.

3. Respondent violated Section 8(a)(1) of the Act by maintaining, giving effect to, and enforcing an overly broad no solicitation rule prohibiting solicitation on company premises without authority or during regular work hours.

4. Respondent violated Section 8(a)(1) of the Act by selectively and disparately enforcing a facially valid employee rule.

5. Respondent violated Section 8(a)(1) of the Act by prohibiting employees from distributing Union literature to other employees on Respondent's parking lot.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent unlawfully maintained and enforced an overly broad no solicitation rule prohibiting solicitation on company premises without authority or during regular work hours. As discussed above, Respondent rescinded its overly broad solicitation policy on December 2, 2004 and notified employees by posting a notice on the company bulletin board. I recommend that Respondent also disseminate this notice individually to all its employees[22] in a separate document and in the same manner as the dissemination of the unlawful solicitation policy. Additionally, I recommend that Respondent post a Board notice to employees at all facilities where the employee handbook has been or is in effect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, North American Pipe Company, Van Buren, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining and enforcing an overly broad no-solicitation rule that prohibits solicitation on company premises without authority or during regular work hours.

(b) Selectively and disparately enforcing its rules because employees exercise their Section 7 rights.

(c) Prohibiting employees from distributing union literature to other employees on Respondent's parking lot and exercising their Section 7 rights.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Van Buren, Arkansas copies of the attached notice marked "Appendix,"[24] and, at each of its other manufacturing facilities where its employee handbook has been, or is in effect, copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2004.

(b) Within 14 days after service by the Region, distribute copies of Respondent's revised solicitation and distribution rules individually to all employees who have received individual copies of Respondent's employee handbook.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 29, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT maintain a provision in our employee handbook that prohibits you from soliciting on company premises without authority or during regular work hours.

You have the right to distribute union literature in nonworking areas on company property during nonworking time. Nonworking areas include the company parking lot.

[22] At all facilities where employees received the handbook containing the unlawful provision.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT stop you from distributing union literature to other employees on the company parking lot by evicting you from our property.

WE WILL NOT selectively or disparately enforce the rules in our employee handbook because you engage in union or other concerted activity that is protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

NORTH AMERICAN PIPE CORPORATION